ORAL ARGUMENT NOT YET SCHEDULED

No. 24-1120 (consolidated with Nos. 24-1121, 24-1122, 24-1124, 24-1126, 24-1128, 24-1142, 24-1143, 24-1144, 24-1146, 24-1152, 24-1153, 24-1155, 24-1222, 24-1226, 24-1227, and 24-1233)

In the United States Court of Appeals for the District of Columbia Circuit

STATE OF WEST VIRGINIA, ET AL.,

Petitioners,

v.

ENVIRONMENTAL PROTECTION AGENCY and MICHAEL S. REGAN, ADMINISTRATOR, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondents.

On Petitions for Review of a Final Action of the United States Environmental Protection Agency

PETITIONERS' AND PETITIONER–INTERVENORS' JOINT PROPOSED BRIEFING FORMAT AND SCHEDULE

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Petitioners and Petitioner–Intervenors have agreed to Respondents' proposed briefing schedule. However, the parties were not able to come to agreement on a proposed briefing format with respect to the number of words allotted to each party. Accordingly, Petitioners and Petitioner-Intervenors file this separate proposal for briefing format.

Filing	**Due Date**	**Words**
Petitioners' Opening Briefs	September 6, 2024	32,000 words total, divided into multiple briefs at Petitioners' discretion
Petitioner-Intervenors' Opening Brief	September 6, 2024	16,000 words total, divided into multiple briefs at Petitioner-Intervenors' discretion
Respondents' Answering Brief	October 11, 2024	32,000 words
Respondent-Intervenors' Briefs	October 18, 2024	16,000 words total, divided into multiple briefs at Respondent-Intervenors' discretion
Petitioners' Replies	October 25, 2024	16,000 words total, divided into multiple briefs at Petitioners' discretion
Petitioner-Intervenors' Replies	October 25, 2024	8,000 words total, divided into multiple briefs at Petitioner-Intervenors' discretion

Deferred Appendix	October 29, 2024	N/A
Final Briefs Due	November 1, 2024	See above

All parties agree that this case requires a word allotment greater than a single standard-length brief for each side to fully and fairly litigate the complex issues of statutory interpretation and the record-intensive arguments at hand. *See* Circuit Rule 28(e). There are 45 petitioners, including 27 states, trade associations, individual companies, and labor unions. Those Petitioners have submitted diverse preliminary issue statements, which identify issues that are unique to various Petitioners, including issues of state sovereignty, and issues that relate to the diverse business models and physical properties of various Petitioners and their facilities. And they present potential disagreements regarding the nature of certain arguments that may require divided briefing. For example, one party is both a petitioner and an intervenor-respondent.

This proposal is modest given the circumstances, and is consistent with the Court's and the Parties' shared desire for efficiency. The total proposed word count for Petitioners' opening briefs is less than the size of two and a half standard briefs but encompasses the arguments of 45 petitioners. In similar cases, this Court has authorized far longer briefs. For example, to litigate the petitions for review of the "Clean Power Plan"—a predecessor to the rule at issue—this Court authorized 42,000 words for both

Petitioners' and Respondents' opening briefs and 21,000 words for Petitioners' Reply. *West Virginia. v. EPA*, No. 15-1363 (Order Jan. 28, 2016) (Doc.#1595922). Similarly, to litigate the petitions for review of the "Affordable Clean Energy Rule"—another predecessor to the rule at issue—this Court authorized 52,800 words across four petitioners' briefs, 52,800 words for Respondents, and 26,400 words across four reply briefs. *Am. Lung Ass'n v. EPA*, No. 19-1140 (Order Jan. 31, 2020) (Doc.#1826621). This case is no less complex.

At the Court's direction, Petitioners and Petitioner-Intervenors have endeavored to "specify the word allotment necessary for each issue." While the ultimate allotment may differ—and some Petitioners are likely not to join all issues—Petitioners would anticipate allocating the following words to the following broad categories of issues in their opening brief (or briefs, if necessary), including the words necessary to provide a statement and summary of argument on these issues:

1. EPA's 90% Carbon Capture and Sequestration (CCS) system fails to meet the statutory requirements for a best system of emission reduction (BSER) (14,000 words).
    a. 90% CCS has not been adequately demonstrated for either existing coal- or new gas-fired units.
    b. 90% CCS is not achievable for either existing coal- or new gas-fired units.
    c. 90% CCS is exorbitantly costly.

d. The rule threatens grid reliability in violation of the statutory limits in Section 111 of the Clean Air Act.

2. EPA's 40% natural gas co-firing requirement for existing coal plants that commit to retire before 2032 fails to meet the statutory requirements for BSER (2,200 words).
   a. 40% natural gas co-firing at existing coal-fired units is not achievable.
   b. 40% natural gas co-firing is exorbitantly costly for many units.
3. The Rule violates the major questions doctrine and *West Virginia v. EPA*, 597 U.S. 697 because it results in unlawful generation shifting (3,000 words).
4. The Rule is arbitrary and capricious (5,500 words).
   a. EPA failed to consider important aspects of the problem and acted arbitrarily and capriciously with regard to its assessment of CCS.
   b. EPA's position on CCS runs contrary to the evidence.
   c. EPA failed to consider important aspects of the problem and acted arbitrarily and capriciously with regard to its assessment of pipeline availability, construction time, and cost.
   d. EPA failed to consider important aspects of the problem and acted arbitrarily and capriciously with regard to storage and sequestration.

e. EPA acted arbitrarily and capriciously with regard to its reliance on deeply flawed modeling that is inconsistent with every other available model.

f. EPA failed to adequately address Petitioners' comments.

5. The Rule infringes on discretion preserved for the States under the Act (5,500 words).

6. Other statutory arguments (1,500 words).

   a. Because EPA already regulates coal plants under Section 112, it cannot also do so under Section 111.

7. The Clean Air Act Does not authorize EPA to subcategorize by retirement (300 words).

As for the Intervenors' word limits, Petitioners and Petitioner-Intervenors propose allotting Intervenors 50% of the words allotted to Petitioners and Respondents. This will increase the efficiency of briefing as it is fewer words than the ratio contemplated by this Circuit's Rules, which typically authorize Intervenor Briefs to be about 70% the size of the Petitioner's or Respondent's brief. *See* Circuit Rules 28, 32(e) (authorizing 9,100 words for an intervenor brief, compared to 13,000 for principal briefs).

While Petitioners and Petitioner-Intervenors are dedicated to working together to brief this case as efficiently as possible, Respondents' proposed word limits are both inadequate and inequitable. To start, while Respondents propose to grant Respondent-Intervenors separate briefs with a generous word limit, Respondents allot *no words* at all for Petitioner-

Intervenors. Respondents argue that Petitioner-Intervenors have aligned interests with certain petitioners, but both the Tennessee Public Power Association and the Louisiana Public Service Commission are unique entities who have been granted intervention in this case expressly to protect their unique interests, much like Respondent-Intervenors. Respondents' lopsided proposal means that those challenging the Final Rule are allotted 26,000 words for their opening briefs, while those defending the Rule are allotted 44,200 words for their opening briefs. Respondents' proposed disparity should be rejected.

By contrast, Petitioners' and Petitioner-Intervenors' proposal hews more closely to this Court's recent practice. For example, in *Utah v. EPA*, this Court granted Petitioner-Intervenors a separate brief and word allotment, granted EPA the same total words allotted to Petitioners (but not including the words separately allotted to Petitioner-Intervenors), and granted all Intervenors a limited number of words to incentivize against repetition. No. 23-1157 (Order, Dec. 4, 2023) (Doc.#2029865).

Given the complexity of this case, the number of parties, and the breadth of issues to be briefed as detailed above, Petitioners and Petitioner-Intervenors maintain that adequately briefing this case requires more words than the Respondents have suggested, but nonetheless propose word limits substantially lower than those allowed in similar cases. Petitioners and Petitioner-Intervenors respectfully request that this Court authorize the word limits proposed by them in lieu of Respondents' proposal.

Dated: August 2, 2024

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CERTIFICATE OF COMPLIANCE

The foregoing Proposed Briefing Format and Schedule complies with the typeface and type-volume requirements of the rules of this Court and Federal Rules of Appellate Procedure. The document is set in 14-point Palatino Linotype font and contains 1,182 words.

/s/ *Michael B. Schon*

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CERTIFICATE OF SERVICE

I certify that on this 2nd day of August, 2024, I filed the foregoing Proposed Briefing Format and Schedule with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to all participants in this case who are registered CM/ECF users.

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